TWO MODELS OF CONSTITUTIONAL ADJUDICATION

R. GEORGE WRIGHT*

TABLE OF CONTENTS

INTRODUCTION

Lawyers and scholars consider the problem of constitutional adjudication in a variety of ways. For example, scholars have considered the nature and limits of judicial activism.[1] In addition, numerous

* Professor of Law, Cumberland School of Law, Samford University. J.D. 1982, Indiana University; Ph.D. 1976, Indiana University, A.B. 1972, University of Virginia. The author's thanks go to Robert C. Post, who is, of course, nevertheless blameless with respect to what follows.

1. *See, e.g.*, Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 3 (1971) (positing judicial role of applying neutral principles to constitutional problems rather than using judges' values in deciding cases); Johnson, *The Role of the Judiciary with Respect to the*

scholars disagree about the proper role of original intent, of the constitutional text itself, of tradition, and of popular and judicial moral reasoning in the process of constitutional adjudication.[2]

In light of this unresolved controversy, it may seem irresponsible to divide constitutional adjudication along the unfamiliar lines of two new models. The two models, however, do not merely complicate an already unmanageable set of theoretical problems. Focusing on these new approaches allows us to clarify the structure of constitutional law and to develop advantageous ways of resolving constitutional issues.

Case law already implicitly incorporates these models. They cut directly across the more familiar distinctions between judicial activism and restraint, interpretivism and non-interpretivism, and ideological conservatism, liberalism, and radicalism.[3] The two models provide students of the law a new framework with which to read familiar constitutional cases in illuminating ways. Most importantly, the two models assist in promoting better reasoned constitutional adjudication. In particular, recognition of these two models enhances legitimate democratic influences on constitutional adjudication, as opposed to giving free rein to the philosophical idiosyncracies of appellate judges, while simultaneously preserving

---

Other Branches of Government, 11 GA. L. REV. 455, 463-69 (1977) (asserting that constitutional doctrines of federalism and separation of powers circumscribe judiciary in reviewing matters involving legislative and executive decisions); Posner, *The Meaning of Judicial Self-Restraint*, 59 IND. L.J. 1, 10-18 (1983) (discussing role of judiciary as check on government institutions but only to extent allowed by Constitution and intent of framers).

2. *See, e.g.*, Alexander, *Painting Without the Numbers: Non-Interpretive Judicial Review*, 8 U. DAYTON L. REV. 447, 451-58 (1983) (describing role of pre-constitutional rules of interpretation in theory that judges should look to original intent rather than creating law); Bork, *Styles in Constitutional Theory*, 26 S. TEX. L.J. 383, 383-84 (1985) (expanding on Madisonian dilemma of rule by majority versus rule by authoritative minority); Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 209-17 (1980) (comparing originalism, which ostensibly follows framers' intent, with intentionalism, which seeks to interpret that intent); Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 707-10 (1975) (contrasting role of judiciary as interpreter of Constitution with role as expounder of national values); Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U.L. REV. 226, 232-36 (1988) (relating theory that judges should be restrained by text of Constitution rather than by historical intention of its framers); Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 362-65 (1981) (expounding on effects of *stare decisis* and common law rules on original intent); Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional "Interpretation"*, 58 S. CAL. L. REV. 551, 557-61 (1984) (discussing tradition as providing authority behind Constitution and asserting that judiciary validates Constitution in its decisions); Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?*, 73 CALIF. L. REV. 1482, 1491-95 (1985) (drawing relationship between authority, justification, and history as factors in formulation and interpretation of Constitution and framers' intent).

3. *See* Lipkin, *Beyond Skepticism, Foundationalism and the New Fuzziness: The Role of Wide Reflective Equilibrium in Legal Theory*, 75 CORNELL L. REV. 811, 872-74 (1990) (discussing familiar disagreements generated by constitutional adjudication and asserting that they are fundamental to any approach to constitutional interpretation).

the status of constitutional provisions as barriers to the tyranny of the numerical majority.[4]

The two models borrow, somewhat loosely, basic ideas and terminology from two schools of thought which cut across the philosophical fields of epistemology and ethics.[5] Borrowing terminology and some primary concepts, the two models elucidated in this article may be referred to as the foundationalist[6] and the coherentist[7] models of constitutional adjudication. The distinction between foundationalism and coherentism will be explored at some length in Part III of this article. For present purposes, suffice it to say that foundationalism and coherentism in the constitutional context present different structural relationships between constitutional, statutory, and regulatory provisions.

According to constitutional foundationalism, the relations of justification between constitutional, statutory, and regulatory provisions exclusively conform to a strict hierarchy.[8] Foundationalists simply assume that constitutional provisions are justified as long as attention is confined to the legal system.[9] Whether constitutional norms are justified, outside the legal system, by their self-evident

---

4. *See* Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1689 (1984) (explaining Constitution's role as check on illegitimate exercise of political power by numerical majority). The classic jurisprudential discussion of majoritarian tyranny is found in the writings of James Madison. *See* THE FEDERALIST No. 10 (J. Madison) (J. Cooke ed. 1961) (advocating Constitution as means of validating minority rights and halting majoritarian tyranny). The classic discussion of the value of freedom of speech, as exercised by unpopular minorities in particular, is that of John Stuart Mill. *See generally* J.S. MILL, ON LIBERTY (D. Spitz ed. 1975) (asserting value of free speech as exercised by unpopular minorities to counter oppression by majority).

5. *See infra* notes 28-33 and accompanying text (relating philosophical contexts in which foundationalism and coherentism have been applied).

6. *See, e.g.*, Alston, *Two Types of Foundationalism*, 73 J. PHIL. 165, 165-70 (1976) (proposing theory of belief justification based on structural notion that certain beliefs provide foundation for others); Annis, *Epistemic Foundationalism*, 31 PHIL. STUDIES 345, 347-50 (1977) (theorizing that truth is based on self-justified basic statements); Van Cleve, *Foundationalism, Epistemic Principles, and the Cartesian Circle*, 88 PHIL. REV. 55, 55-57 (1979) (suggesting existence of class of immediately justified propositions).

7. *See, e.g.*, B. BLANSHARD, THE NATURE OF THOUGHT 212-31 (1964) (setting forth coherence theory of truth where beliefs mutually support each other); Chisholm, *On the Nature of Empirical Evidence*, in EMPIRICAL KNOWLEDGE: READINGS FROM CONTEMPORARY SOURCES 224, 231-37 (R. Chisholm & R. Swartz eds. 1973) (outlining coherence theory of perception that people attempt to justify perception with personal sets of beliefs); Quine, *On What There Is*, in FROM A LOGICAL POINT OF VIEW 1, 130-32 (2d rev. ed. 1980) (discussing coherence theory of reference in which it is possible that concepts in one theory may be relevant to second theory, even though when applied to second theory, concepts are no longer definable in terms of first theory).

8. *See* Annis, *supra* note 6, at 345-46 (defining foundationalism as hierarchical relationship between ideas, with certain ideas forming basis for others because of their self-justified nature); Van Cleve, *supra* note 6, at 76 (recounting foundationalist hierarchy where second-order beliefs stem directly from self-evident basic ideas).

9. *See* Annis, *supra* note 6, at 345-46 (assuming that certain values are justified on their own in that their self-evidence justifies their position as foundation for other beliefs).

nature, indubitable validity, or by moral principles outside the constitutional system, a foundationalist system of case adjudication accepts those constitutional norms as given.[10] As the foundation of the legal system, constitutional provisions validate and demarcate the legitimate content and scope of related statutes.[11] In turn, constitutional and statutory provisions act together in justifying and circumscribing the legitimate content of administrative regulations.[12] Foundationalism is thus hierarchical.

A crucial feature of foundationalism requires explication. According to constitutional foundationalism, the asymmetric relationships of justification or legitimate infusion of content flow in only one direction.[13] Whether we think of constitutional provisions as the "higher" or more "basic" law, constitutional foundationalism holds that while constitutional provisions may justify or provide legitimate substance to statutes, the converse is untenable.[14] A statute cannot properly delimit or provide substance to a constitutional provision any more than a mid-level tier of a pyramid can provide the foundation for an entire pyramid.[15]

The second model of constitutional adjudication, constitutional coherentism, permits departures from the strict hierarchy, asymmetry, and uni-directionality of constitutional foundationalism.[16] Constitutional coherentism simply raises the possibility that a relevant statute or administrative regulation could help justify, provide content for, or demarcate the legitimate scope of a constitutional provision.[17] Constitutional coherentism thus permits the blurring or

---

10. *Id.*

11. *Id.*

12. *Id.*; *see also* Van Cleve, *supra* note 6, at 76-78 (stating that foundationalism builds belief system from basic ideas, which generate, and hence justify, further beliefs and basic ideas combined with generated ideas to justify and provide content to other notions).

13. *See* Sosa, *The Raft and the Pyramid: Coherence Versus Foundations in the Theory of Knowledge*, in 5 MIDWEST STUDIES IN PHILOSOPHY: STUDIES IN EPISTEMOLOGY 3 (P. French, T. Uehling & H. Wettstein eds. 1980) (noting that basic principle of foundationalism requires that flow be unidirectional, from foundational notions through rest of hierarchy); *see also* Van Cleve, *supra* note 6, at 78 (relating unidirectional flow of ideas in foundationalist theory as necessary because basic beliefs cannot be influenced by those that they generate).

14. *See* Sosa, *supra* note 13, at 4 (arguing that foundationalism cannot have basic, self-justified notions influenced or justified by rest of hierarchy because basic principles would not be self-justified or indubitable).

15. *See id.* at 3 (creating analogy of pyramid for foundationalism to illustrate its organization).

16. *See id.* at 7 (comparing coherentism with foundationalism and noting difference in structural organization and flow of ideas because coherentism posits mutually supporting and influencing notions); Van Cleve, *supra* note 6, at 76-80 (contrasting coherentism with foundationalism on basis of lack of hierarchy and symmetry of coherentism where all ideas may justify each other).

17. *See* Sosa, *supra* note 13, at 7 (positing that coherentism provides mutual interaction between principles such that collection of various ideas support and inform each other); Van

obscuring of the hierarchical structure within federal and state judicial systems.[18] At the very least, coherentism permits constitutional and statutory provisions to be treated as somehow mutually supporting, similar to the various planks of a raft.[19]

Constitutional coherentism may therefore strike many as not merely unfamiliar, but as viciously circular, as a recipe for chaos or tyranny, and as constitutionally illegitimate. This Article attempts to prove these first impressions false and to demonstrate constitutional coherentism's genuine theoretical and practical value. In particular, the coherentist model permits the promotion of morally legitimate democratic influences on the process of constitutional adjudication without impinging upon the counter-majoritarian character of the Constitution. The first part of this Article discusses the distinction between constitutional foundationalism and constitutional coherentism and, in particular, seeks to defend the value and legitimacy of constitutional coherentism.

For now, setting the stage for such a discussion requires a few qualifications and disclaimers. First, both models appear in numerous configurations. In particular, advocates of each approach differ about the "breadth" of constitutional foundationalism or coherentism; that is, the variety of authorities that constitutional adjudication may legitimately consider.[20] The distinction between the models in no way erases conflicts over recourse to material beyond the constitutional framers' intent[21] or over the importance of tradition in due process cases.[22] Both constitutional foundationalists and constitu-

---

Cleve, *supra* note 6, at 76 (setting forth coherentism as positing a set of principles that influence and justify each other so that no privileged notion stands alone as basic or fundamental).

18. *See* C. DUCAT & H. CHASE, CONSTITUTIONAL INTERPRETATION 546-47 (1983) (setting out traditional relationship between federal and state judicial systems in which Supreme Court settles conflicts between national and state interests giving substantial weight to national power).

19. *See* Sosa, *supra* note 13, at 3 (analogizing coherentism to structure of raft to illustrate theory's structure of mutual support).

20. *Compare* Quine, *Two Dogmas of Empiricism*, in FROM A LOGICAL POINT OF VIEW 20-46 (1961) (basing coherence theory of epistemology on subjects' disposition towards or agreement with statements) *with* Popper, *Epistemology Without a Knowing Subject*, in OBJECTIVE KNOWLEDGE 106-52 (1972) (founding coherence theory solely on logical relationship between propositions). *Compare also* Alston, *supra* note 6, at 165 (discussing foundationalist theory of justification of beliefs as basic foundation) *with* Annis, *supra* note 6, at 345 (theorizing that basis for foundationalism is objective truths).

21. *Compare* Bork, *supra* note 2, at 383-84 (focusing on original intent in constitutional interpretation) *with* Perry, *supra* note 2, at 588-89 (advocating more expansive, inclusionary approach to sources of constitutional insight).

22. *Compare* Burnham v. Superior Court of Cal., 110 S. Ct. 2105, 2109 (1990) (Scalia, J.) (looking solely to tradition as embodied by jurisdictional statutes and practice to determine process due) *with id.* at 2120 (Brennan, J., concurring) (agreeing that tradition important to due process analysis but also advocating independent due process inquiry). *See also infra* notes 49-74 and accompanying text (discussing *Burnham* opinions and characterizing Justice Scalia's approach as coherentist and Justice Brennan's as involving coherentist element). The *Burn-*

tional coherentists must, although perhaps on different grounds, adopt some rule as to what kinds of arguments should inform constitutional adjudication.[23] This task might best be accomplished on pragmatic grounds.[24] Recognizing the value of constitutional coherentism may, however, affect our judgment as to what is really necessary in this regard.

Second, contemporary philosophical schools by analogy allow for other models of constitutional adjudication based on philosophical alternatives to foundationalism and coherentism.[25] Focusing on foundationalism and coherentism, however, demonstrates the his-

---

ham opinions develop a debate begun the previous term. *Compare* Michael H. v. Gerald D., 109 S. Ct. 2333, 2336 (1989) (plurality opinion) (upholding statute on grounds of long-established surrounding tradition) *with id.* at 2349 (Brennan, J., dissenting) (arguing for rejection of statute and stating that tradition-based analysis is inappropriate because concept of tradition is malleable and elusive).

23. *See* R. POSNER, THE PROBLEMS OF JURISPRUDENCE 459 (1990) (observing that no fixed bounds exist in defining appropriate argument in law). Consider as well the possibility that hypothetical cases may, on some occasions, carry more conviction than real case precedents. *See* Hurley, *Coherence, Hypothetical Cases, and Precedent*, 10 OXFORD J. LEGAL STUD. 221, 247 (1990) (critiquing sole reliance on precedent in deciding cases because hypothetical cases provide better guidance for future of rule established in instant case). Into the mix may be thrown arguments that legal theories, as opposed to legal generalities, grasped without distilling a legal theory, are unnecessary in legal adjudication. *See* Lipkin, *supra* note 3, at 832 (summarizing various ideologies but arguing that legal rules, not theories of law, should govern decision of cases).

24. *See* Epstein, *The Risks of Risk/Utility*, 48 OHIO ST. L.J. 469, 476 (1987) (arguing in tort context against broad, inclusive considerations used in case adjudication as generating results inferior to those reached under fixed rules); Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 837-38 (1973) (opining that number of factors for analysis should be limited to achieve less confusion and hence superior result). Epstein suggests an inevitable tradeoff exists between the "validity" and the "reliability" of an approach to adjudication. *See id.* at 470 (characterizing validity as identifying ultimate thing to be measured and reliability as insuring repeatable measurements). Thus, an approach which considers a greater number of factors is not inherently superior. *See id.* at 476 (asserting that consideration of numerous factors seems optimal but results in unpredictable battle of experts). The need to consider a greater number of factors, especially in the absence of crisp rules establishing their weight, tends to undermine the quality and predictability of the adjudicatory process. *Id.* In the context of constitutional adjudication, this thesis implies that a broadly inclusive constitutional foundationalism or coherentism is not necessarily more appropriate.

25. *See, e.g.*, A. GOLDMAN, EMPIRICAL KNOWLEDGE 51-54 (1988) (setting forth reliabilism theory where primary justification for beliefs attaches to disposition to act, with actual act as secondary justification); R. RORTY, CONTINGENCY, IRONY, AND SOLIDARITY 15-21 (1989) (advocating pragmatic theory of truth through life experiences); R. RORTY, PHILOSOPHY AND THE MIRROR OF NATURE 12-13 (1979) (advancing idea that pictures and metaphors, rather than affirmative statements, determine most people's philosophical convictions); Sosa, *supra* note 13, at 23 (accounting for people's actions under theory that person's prior disposition provides major justification for acts). Some theorists attempt to transcend the perceived defects of both foundationalism and coherentism. *See* Kornblith, *Beyond Foundationalism and the Coherence Theory*, 77 J. PHIL. 597, 598 (1980) (asserting that foundationalism and coherentism inaccurately state that knowledge is justified by true belief, rather than by experience); Shiner, *Foundationalism, Coherentism, and Activism*, 3 PHIL. INVESTIGATIONS 33, 33 (1980) (developing briefly hybrid model combining aspects of foundationalism and coherentism). For a recent critique of Rorty's position, see Haack, *Recent Obituaries of Epistemology*, 27 AM. PHIL. Q. 199, 199-202 (1990) (providing reformist position accepting legitimacy of traditional projects but repudiating idea of *a priori* knowledge or beliefs).

toric importance of the former[26] and the contemporary preeminence of the latter.[27] Such a focus also demonstrates the wide variety of philosophical contexts in which foundationalism and coherentism have been applied, including theories of moral and factual belief justification,[28] belief revision,[29] values,[30] ethics,[31] jurisprudence,[32] and the narrower realm of a pure theory of truth or knowledge.[33]

Based on these diverse uses, it appears reasonable to suspect that the distinction between foundationalism and coherentism may prove a valuable tool in constitutional adjudication. This application need not involve detailed duplication of definitions and notions developed in other contexts, but rather a mere utilization of the

---

26. *See* Cornman, *Foundational Versus Nonfoundational Theories of Empirical Knowledge*, 14 AM. PHIL. Q. 287, 287 (1977) (describing development of foundationalism as parallel to early development of epistemic theories).

27. *See* R. DWORKIN, TAKING RIGHTS SERIOUSLY 283 (rev. ed. 1978) (asserting that judges make decisions by weighing whether plaintiff's or defendant's case better coheres with settled law); Kress, *Legal Reasoning and Coherence Theories: Dworkin's Rights Thesis, Retroactivity, and the Linear Order of Decisions*, 72 CALIF. L. REV. 369, 369 (1984) (maintaining that philosophers developed coherence theories in attempt to avoid inadequacies of foundationalist accounts of truth and justification).

28. *See, e.g.*, Korner, *On the Coherence of Factual Beliefs and Practical Attitudes*, 9 AM. PHIL. Q. 1, 5-7 (1972) (arguing that people do not cohere moral, scientific, and logical beliefs into one belief system); Moore, *Moral Reality*, 1982 WIS. L. REV. 1061, 1112-13 (1982) (stating that perceptual experiences compel factual judgments but moral feelings do not compel moral judgments); Schneewind, *Moral Knowledge and Moral Philosophy*, in ROYAL INSTITUTE OF PHILOSOPHY, KNOWLEDGE AND NECESSITY 249, 258-62 (1970) (discussing use of moral principles in body of moral knowledge as basic, substantive entities that may not be overridden).

29. *See, e.g.*, G. HARMAN, CHANGE IN VIEW 29-33 (1986) (presenting foundationalism as tracking original beliefs and coherentism as focusing on present beliefs); R. NISBETT & L. ROSS, HUMAN INFERENCE STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT 177 (1980) (noting that people can be made aware of truth after holding false beliefs if made aware of tendency toward holding false beliefs); Ross & Anderson, *Shortcomings in the Attribution Process: On the Origins and Maintenance of Erroneous Social Assessments*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 147, 149 (P. Kaheman & A. Twerski eds. 1982) (relating lasting effects of false information even after false belief rejected).

30. *See* Audi, *Axiological Foundationalism*, 12 CAN. J. PHIL. 163, 165 (1982) (averring existence of values which are justified directly and without basis in other values); D. ARMSTRONG, BELIEF, TRUTH AND KNOWLEDGE 95-96 (1973) (requiring that value be placed on every proposition in order to form basis for beliefs).

31. *See, e.g.*, J. RAWLS, A THEORY OF JUSTICE 47 (1971) (viewing experience as part of ethics system, not as merely contributing factor); DePaul, *Naivete and Corruption in Moral Inquiry*, 48 PHIL. & PHENOM. RES. 619, 620 (1988) (finding formative experience and reasoning experience as influences on ethics); Daniels, *Reflective Equilibrium and Archimedian Points*, 10 CAN. J. PHIL. 83, 85-86 (1980) (forming moral judgments by moral principles coupled with background theories about world).

32. *See, e.g.*, Dworkin, *No Right Answer?*, 53 N.Y.U. L. REV. 1, 30-31 (1978) (admitting possibility that case may have no right answer but stating that modern legal system makes such possibility rare because of complexity and development); Raz, *Legal Principles and the Limits of the Law*, 81 YALE L.J. 823, 826 (1972) (holding view that judges cite principles from both within law and from outside sources).

33. *See* G. HARMAN, THOUGHT 67-71 (1973) (advancing notions of truth-based structure and stating that truth depends on articulated sentences having proper structure within belief); R. WALKER, THE COHERENCE THEORY OF TRUTH 7 (1989) (believing truth stems from interaction of ideals derived from real experience).

general distinction between foundationalism and coherentism. This Article next discusses how the constitutional case law currently embodies, doubtless unconsciously, some sense of this distinction. Finally, the Article attempts to make the rough, implicit distinction between foundationalism and coherentism found in constitutional case law more explicit and defends the apparently problematic use of coherentism in constitutional law.

I. FOUNDATIONALISM AND COHERENTISM AS IMPLICIT WITHIN CONSTITUTIONAL CASE LAW

A. Foundationalism as a Backdrop to Coherentism

It is not easy to characterize a typical constitutional case analysis. The most typical depiction of constitutional interpretation involves a foundationalist analysis because it views the Constitution as hierarchically fundamental law.[34] For example, when a statute penalizing the possession of adult[35] or child[36] pornography within the home is constitutionally challenged, foundationalist analysis seems the most obvious model for deciding the case because first amendment and privacy standards are assumed to be fixed and determinate.[37] The legal system presumes that the scope and content of the relevant constitutional provisions are unaffected by the challenged statutory provision.[38] This analysis prevents circular reasoning and supports the Constitution's fundamental status. The statute is viewed in the light of the Constitution to determine if it passes or fails some appropriate constitutional test.[39] Thus, the system main-

---

34. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 180 (1803) (declaring Constitution supreme law of land against which government actions measured); *see also* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat) 304, 325-26 (1816) (holding all state law subject to provisions of federal Constitution). *See generally* C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969) (outlining structure of government with Constitution as source of all law).

35. *See* Stanley v. Georgia, 394 U.S. 557 (1969) (holding that first amendment prohibits statutes criminalizing possession of obscene materials).

36. *See* Osborne v. Ohio, 110 S. Ct. 1691 (1990) (upholding against first amendment challenge statute criminalizing possession and viewing of child pornography).

37. *See Stanley*, 394 U.S. at 560 (basing legal analysis on first amendment standards by subjecting statute to tests of overbreadth and violation of free speech protections); *Osborne*, 110 S. Ct. at 1698 (analyzing statute under first amendment jurisprudence to determine if it violates rights guaranteed by that amendment).

38. *See Marbury*, 5 U.S. (1 Cranch) at 180 (setting Constitution above statutes so that if statute found violative of Constitution, statute must fall); *see also Osborne*, 110 S. Ct. at 1698-99 (determining validity of statute by reference to constitutional standards); *Stanley*, 394 U.S. at 560-62 (distinguishing present case from precedent, rather than re-interpreting Constitution's meaning, to determine violation of Constitution).

39. *See Marbury*, 5 U.S. (1 Cranch) at 178-80 (considering statute in light of constitutional authority and determining it to be constitutional); *see also Osborne*, 110 S. Ct. at 1699 (deciding statute passes test of overbreadth and therefore is constitutionally valid); *Stanley*, 394 U.S. at 564 (questioning whether statute passes test of permitting individuals to receive information without government controlling content of thought).

tains the hierarchical and asymmetrical relationship between constitutional provisions and the statutes enacted thereunder.

B. Coherentism in Constitutional Decisions

These conclusions may seem self-evident and perhaps even unavoidably mandated by the idea of a Constitution.[40] A dispassionate examination of the case law suggests, however, that not all constitutional analysis is clearly and unequivocally foundationalist.

1. Due process cases

Consider the well-known procedural due process analysis adopted by Justice Rehnquist in a plurality opinion in *Arnett v. Kennedy*[41] and in dissent in *Cleveland Board of Education v. Loudermill*.[42] Both cases concerned the adequacy of statutory procedures governing the deprivation of substantive liberty or property rights granted by the same statute.[43] Justice Rehnquist's approach can be characterized as a "strong" form of constitutional coherentism under which purely statutory procedural rights not only influence, but exclusively dictate, the scope of federal due process rights.[44] In each opinion, Justice Rehnquist advocated using statutory provisions alone to define due process rights.[45]

In contrast, the Supreme Court majority in *Loudermill* eventually

---

40. *See Marbury*, 5 U.S. (1 Cranch) at 176-77 (holding Constitution as law against which government actions tested). *See generally* C. BLACK, *supra* note 34, at 74-90 (describing Supreme Court's role in constitutional system as policing state and federal government actions to ensure conformity with federal constitutional guarantees); B. SCHWARTZ, CONSTITUTIONAL LAW (1972) (defining structure of government and laws with Constitution providing ultimate justification).

41. 416 U.S. 134 (1974) (Rehnquist, J.) (plurality opinion) (finding due process clause does not by itself expand job retention rights held by government employees, even when employee has qualified statutory right not to be discharged except for cause).

42. 470 U.S. 532, 559 (1985) (Rehnquist, J., dissenting) (disagreeing with majority holding that due process requires pre-termination opportunity to respond to firing and post-termination administrative procedures).

43. *Compare* Arnett v. Kennedy, 416 U.S. 134, 143 & n.9 (1974) (Rehnquist, J.) (citing 5 C.F.R. § 752.202(a) (entitling employee to thirty day notice of adverse action prior to removal)) *with* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 539-40 n.6 (1985) (Rehnquist, J., dissenting) (concerning civil service employee entitlement to appeal of decision to terminate).

44. *Compare Loudermill*, 470 U.S. at 559 (Rehnquist, J., dissenting) (advocating reliance on statutory provisions to analyze constitutional requirements under due process) *and Arnett*, 416 U.S. at 151-52 (Rehnquist, J.) (plurality opinion) (relying exclusively on statutorily prescribed procedures to determine due process rights) *with* Sosa, *supra* note 13, at 4 (explaining coherentism as lacking hierarchical organization such that all values within set interact to provide basis and definition for each other) *and* Van Cleve, *supra* note 6, at 76 (defining coherentism's structure as validation of beliefs through mutual support such that each notion informs others).

45. *See Loudermill*, 470 U.S. at 559 (Rehnquist, J., dissenting); *Arnett*, 416 U.S. at 151-52 (Rehnquist, J.) (plurality opinion).

held that the minimum constitutional rights enjoyed by an individual cannot be diminished by the procedures for deprivation specified by the statute.[46] The *Loudermill* majority rejected not so much coherentism itself, but rather Justice Rehnquist's controversial formulation of it.[47] According to his formulation, statutory rights provided not only one possible influence on rights, but exclusively dictated the content or scope of constitutional due process rights.[48] Other types of due process cases, by contrast, find justices, ordinarily divided along other lines, jointly adopting coherentist constitutional analysis.

For instance, the recent case of *Burnham v. Superior Court*[49] illustrates this point. *Burnham* involved the adequacy, under the due process clause, of the service of a court summons and divorce petition upon a New Jersey resident visiting in California.[50] The foreign resident was voluntarily present within the State of California on a temporary basis for reasons largely unrelated to the divorce suit.[51] Justice Scalia, writing for the Court, adopted a recognizably coherentist approach in concluding that the service of process comported with the "traditional notions of fair play and substantial justice" required by the due process clause.[52] He observed that the legitimacy of personal jurisdiction over physically present nonresidents stems from "firmly established principles of personal jurisdiction in American tradition,"[53] mainly based on statutes and court decisions.[54] This principle could be traced from Roman origins[55] through English practice[56] to numerous nineteenth and early twentieth century American state court decisions.[57] The opinion reported finding no

---

46. *See Loudermill*, 470 U.S. at 541 (quoting Vitek v. Jones, 445 U.S. 480, 491 (1980)) (determining that due process requires pre- and post-termination proceedings when firing government employee, even for cause).

47. *Id.* at 559.

48. *Id.* at 562-63 (Rehnquist, J., dissenting).

49. 110 S. Ct. 2105 (1990).

50. Burnham v. Superior Court, 110 S. Ct. 2105, 2109 (1990) (involving wife's move to California with children after which husband sought New Jersey divorce on desertion grounds).

51. *See id.* (noting husband had little other connection to California).

52. *Id.* at 2110 (quoting International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)) (upholding service by defining due process based on statutes and practice of courts dealing with jurisdictional issues).

53. *Id.* (citing Potter v. Allin, 2 Root 63, 67 (Conn. 1793)).

54. *Id.* at 2116.

55. *Id.* at 2111 (citing J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS §§ 543, 554 (1946) and Picquet v. Swan, 19 F. Cas. 609, 611-12 (No. 11,134) (C.C. Mass. 1928)).

56. *Id.* at 2110-11 (citing Mostyn v. Fabrigas, 98 Eng. Rep. 1021 (K.B. 1774) and Cartwright v. Pettus, 22 Eng. Rep. 916 (Ch. 1675)).

57. *Id.* at 2111-12 (citing Smith v. Gibson, 83 Ala. 284, 285, 3 So. 321 (1887); Roberts v. Dunsmuir, 75 Cal. 203, 204, 16 P. 782 (1888); Hart v. Granger, 1 Conn. 154, 165 (1814); Hagen v. Viney, 124 Fla. 747, 751, 169 So. 391, 392-93 (1936); Darrah v. Watson, 36 Iowa

state or federal statute or decision under state law that abandoned in-state service as a basis of jurisdiction.[58]

According to Justice Scalia's analysis, this general state of the law established both the due process clause's content and the continuing vitality and widespread acceptance of the traditional notions of fair play and substantial justice.[59] On this basis, Justice Scalia determined that no violation of Burnham's due process rights occurred.[60] The opinion concluded that "jurisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define the due process standard of 'traditional notions of fair play and substantial justice.' "[61]

What makes this approach coherentist is not the appeal to tradition or to vaguely ethical standards of fair play and substantial justice, but the recourse to relevant state and federal statutes.[62] Justice Scalia considers the substantive content of state and federal jurisdictional statutes in order to establish the relevant traditions and requirements of fair play and substantial justice.[63] This in turn establishes the substantive content and the scope of the require-

---

116, 120-21 (1872); DePoret v. Gusman, 30 La. Ann., pt. 2, pp. 930, 932 (1878); Savin v. Bond, 57 Md. 228, 233 (1881); Baisley v. Baisley, 113 Mo. 544, 549-50, 21 S.W. 29, 30 (1893); Mussina v. Beldin, 6 Abb. Pr. 165, 176 (N.Y. 1858); Reed v. Hollister, 106 Or. 407, 412-14, 212 P. 367, 369-70 (1923); Vaugn v. Love, 324 Pa. 276, 280, 188 A. 299, 302 (1936); Bowman v. Flint, 37 Tex. Civ. App. 28, 29, 82 S.W. 1049, 1050 (1904); Vinal v. Core, 18 W. Va. 1, 20 (1881)).

58. *Id.* at 2113.

59. *See id.* at 2116 (ruling no violation of due process when jurisdiction based on physical presence alone by analyzing state and federal jurisdictional statutes and court procedures to interpret "traditional notions of fair play and substantial justice").

60. *Id.*

61. *Id.* at 2115.

62. *Compare id.* at 2110-16 (reviewing statutes on jurisdiction to determine meaning of due process test) *with* Van Cleve, *supra* note 6, at 76 (defining coherentism as interaction of elements within system to provide meaning to each other). Justice Scalia utilized coherentism the previous term in defining a sufficient liberty interest for purposes of invoking due process clause protection. *See* Michael H. v. Gerald D., 109 S. Ct. 2333, 2341 (1989) (upholding denial of hearing on probable natural father's petition for visitation rights and for establishment of paternity). Justice Scalia concluded that only those interests "traditionally protected by our society" count as sufficient liberty interests. *Id.* One indicator of whether an interest traditionally received protection is whether statutory law protected it. *Id.* at 2341 n.2. Thus again, the scope and content of constitutional rights depend, in part, upon the scope and content of the statutory rights ordinarily justified by conformance with the Constitution, their supposedly fundamental source. Justice Brennan's dispute with Justice Scalia in *Michael H.* concerns the types of sources of law that may be consulted, but not the legitimacy of the approach. *See id.* at 2349-50 (Brennan, J., dissenting) (maintaining that concept of liberty should gather meaning from experience). Because our experience presumably includes, as one component, statutory and regulatory enactments, Justice Brennan's approach in *Michael H.* is at least compatible with constitutional coherentism.

63. *See Burnham*, 110 S. Ct. at 2105-06 (relying on case precedent as well as statutes to interpret due process clause requirements).

ments imposed by the due process clause of the Constitution.[64] Therefore, the precise type of statute challenged on constitutional due process grounds helps decide, in the relevant respects, what the due process clause of the Constitution permits, requires, and prohibits. To determine whether the statutes are constitutional, we look to the due process clause. To determine what the due process clause requires, however, we look in part to statutes of the sort being challenged.

At least some, if not all, of the relevant state and federal statutes on personal jurisdiction were no doubt drafted in an effort to comply with the requirements of the due process clause. This circumstance, however, neither alters the apparent circularity, whether vicious or virtuous, of Justice Scalia's procedure, nor does it alter the apparent violation of the hierarchy of justification between the "foundation" of the Constitution and the dependent "superstructure" of state and federal statutes. Justice Scalia's procedure looks to the constitutionally challenged statutory practices to give meaning, content, and limits to the due process clause by which those statutes are to be tested.

It is useful to recognize that Justice Brennan's concurring opinion in *Burnham*,[65] despite the extent to which it departed from Justice Scalia's approach in other respects, never objected to constitutional coherentism itself.[66] Justice Brennan willingly considered state and federal jurisdictional statutes and the practices thereunder as evidence of what the due process clause requires.[67] In contrast to Justice Scalia, Justice Brennan understandably refused to confine the inquiry solely to traditionally accepted state or federal statutory practice.[68] Although he found such tradition or "pedigree" relevant, it was by itself rarely dispositive, and Justice Brennan concluded that an independent inquiry into the process that is due must be undertaken.[69]

---

64. *See id.* at 2115 (establishing traditional notions of fair play and substantial justice to determine constitutionality under due process clause).

65. 110 S. Ct. at 2120 (Brennan, J., concurring).

66. *Compare id.* (Brennan, J., concurring) (discussing use of federal and state statutes to aid determination of what due process requires) *with id.* at 2116 (majority opinion) (embarking on analysis of due process based on state and federal jurisdictional statutes).

67. *See id.* at 2120 (Brennan, J., concurring) (utilizing general statutory background and court practice to help decide process due, but also undertaking independent constitutional analysis).

68. *Id.* (Brennan, J., concurring).

69. *See id.* at 2120 n.2 (Brennan, J., concurring) (arguing that reference to "traditional notions of fair play and substantial justice" in International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) was not intended to exclude nontraditional or contemporary notions, but only to indicate that fair play and substantial justice are notions that law traditionally maintained, perhaps in changing or evolving forms).

To the extent that a judge determines the contours of constitutional provisions by consulting sources such as learned treatises, law review articles, contemporary moral theory or popular moral sentiment, or his or her own sense of propriety, the judge may be a judicial activist, but is not a coherentist.[70] For example, a moral theory or a law review article advocating change or continuity in the law may, for the sake of argument, be a legitimate source of even constitutional law.[71] Moral theory and law review articles, however, fall outside the structural hierarchy of legal rules under which justifications flow uni-directionally from a constitutional level to a statutory level to an administrative/regulatory level.[72] Normative moral theory and law review articles, unlike statutes or regulations, are not governed and controlled by any other hierarchical level of the law. Statutes and regulations are, however, governed by the Constitution. No one believes that the Constitution or statutes, or rulings thereon, should control the conclusions reached by moral theorists or the authors of law review articles. In this sense, they are outside the hierarchy. Thus, looking to moral sentiment, law review articles, or other sources is not coherentist because it does not equalize the presumed hierarchical levels of legal hierarchy or make reciprocal the elements of that hierarchy.[73]

Justice Brennan relied in part on a form of coherentism in *Burnham* when he invoked an analysis of statutes, but the independent

---

70. *See* W. LASSER, THE LIMITS OF JUDICIAL POWER 264 (1988) (describing era of judicial activism as Supreme Court expanding applicability of Bill of Rights to states and assuming direct supervision of state and local activities such as race relations, education, and family values, often contrary to legislative will); S. SNOWISS, JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION 208-10, 212-14 (1990) (characterizing judicial activism as product of 1930s Court crisis and replacing reasonableness rule and judicial deference to legislative interpretations of Constitution with aggressive judicial defense of individual rights guarantees of Bill of Rights); Berger, *New Theories of "Interpretation": The Activist Flight from the Constitution*, 47 OHIO ST. L.J. 1, 8-12 (1986) (discussing theories underlying constitutional interpretation and defining judicial activism as making, rather than interpreting, laws).

71. *See* Goldberg v. Kelly, 397 U.S. 254 (1970) (requiring predeprivation hearing before termination of welfare benefits, apparently inspired by Reich, *The New Property*, 73 YALE L.J. 733 (1963) (asserting increased need to safeguard public against unfair deprivation of government largess and suggesting creation of broader property definition thus protected by due process)).

72. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 136, 176-77 (1803) (regarding Constitution as fundamental and paramount law, unchangeable by ordinary means so that legislative acts to contrary not valid law); *see also* INS v. Chadha, 462 U.S. 919, 959 (1983) (subjecting legislative power to careful review under Constitution to preserve freedom); Cooper v. Aaron, 358 U.S. 1, 18 (1958) (noting Article VI statement of Constitution as supreme law of land, binding on states); Berger, *supra* note 70, at 3-8 (opining authoritativeness of Constitution and concluding that its supremacy over statutes and administrative regulations has never been questioned).

73. *See* Sosa, *supra* note 13, at 18 (defining coherentism as relationship of beliefs within particular system such that set of beliefs is mutually supporting). External referents may, however, be used to test a coherentist system. *See infra* notes 170-73 and accompanying text (advocating use of external standards to test coherentist system).

inquiry he called for involves an interpretive approach not rooted in coherentism.[74] Coherentism's general proponents, though, include judges such as Justice Brennan not conventionally thought of as conservative or as opposing judicial activism. Nor is constitutional coherentism confined only to due process cases. The Supreme Court's equal protection jurisprudence employs constitutional coherentism as well.

2. Equal protection cases

Some suggest that the statutory requirements for affirmative action plans under Title VII of the 1964 Civil Rights Act[75] are the same as the constitutional requirements of the equal protection clause.[76] Such a view does not necessarily involve coherentism. To determine whether coherentism is involved, we must explore the relationship between the requirements of Title VII and the equal protection clause.[77] Coherentism will be involved, regardless of the similarity or difference between the standards, if the statutory standards independently affect or help determine the equal protection clause's requirements.[78] Coherentism certainly permits holding a statute incompatible with a constitutional provision and striking it down on that basis as unconstitutional.[79] Obviously, constitutional provisions hold the power of life and death over statutes.[80] Coherentism suggests, however, that constitutional provisions may, in some instances, receive their very meaning and content in part from

---

74. *Compare Burnham*, 110 S. Ct. at 2120 (Brennan, J., concurring) (advocating due process inquiry employing statutory and court practice analysis to determine process due) *with id.* (concluding that independent inquiry into scope of due process also necessary to account for issues such as intent of Constitution and society's needs).

75. Pub. L. No. 88-352, 78 Stat. 243 (codified as amended at 42 U.S.C. §§ 2000(c)-2000(h)(6) (1988)).

76. *See* Johnson v. Transportation Agency, 480 U.S. 616, 649 (1987) (O'Connor, J., concurring) (finding that proper inquiry in evaluating legality of affirmative action plan is same as equal protection standard of employer having firm basis for believing that remedial action required); *see also* G. STONE, L. SEIDMAN, C. SUNSTEIN & M. TUSHNET, CONSTITUTIONAL LAW: 1990 SUPPLEMENT 92-93 n.* (1990) (noting that statutory-based opinion in *Johnson* "widely interpreted" as setting constitutional standards as well).

77. *See* Sosa, *supra* note 13, at 18 (explaining that coherentism focuses on relationships between beliefs within system); Van Cleve, *supra* note 6, at 76 (describing coherentist model as one justifying beliefs by membership in and coherence with set of mutually supporting beliefs).

78. *See* Sosa, *supra* note 13, at 20 (noting that coherent belief system survives by mutual support of beliefs that inform and generate each other).

79. *See* Kress, *supra* note 27, at 370-72 (stating that coherence must attain certain level of consistency and that beliefs not reaching requisite level of coherence cannot belong to that set of beliefs).

80. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 136, 176-77 (1803) (concluding that legislative act contrary to Constitution is not law); *see also* INS v. Chadha, 462 U.S. 919, 951-59 (1983) (holding single House legislative veto of Attorney General decision violative of separation of powers and hence invalid).

statutes enacted pursuant to those constitutional provisions.[81]

Such coherentist jurisprudence does seem to exist in equal protection jurisprudence. Justice O'Connor's concurring opinion in *Wygant v. Jackson Board of Education*[82] provides a recent example. Justice O'Connor observed that the Court faced no Title VII or other statutory issue; the case rested solely on an interpretation of the equal protection clause.[83] Justice O'Connor also noted that states possess not only the constitutional ability, but also the constitutional duty to "eliminate the continuing effects of past unconstitutional discrimination."[84]

The question then arises of what the equal protection clause permits or requires of states in this sensitive area. In *Wygant*, Justice O'Connor answered that "reliable benchmarks" for this determination exist.[85] The "reliable benchmark" provided by Justice O'Connor turns out to be the conditions "sufficient to support a prima facie Title VII pattern or practice claim . . . ."[86] Justice O'Connor's analysis extends beyond the conclusion that the requirements of the Constitution and of the statute happen to coincide in this respect.[87] In particular, she concludes that in order to determine what equal protection requires or permits, employers should simply use the reliable guide of a prima facie violation of the statute.[88]

This conclusion may raise the possible objection that the statutory requirements act as a reliable guide to the substance and meaning of the equal protection clause only because the statute was drafted to parallel the requirements of the equal protection clause. Furthermore, changes in the relevant equal protection jurisprudence might

---

81. *See* Sosa, *supra* note 13, at 20 (explicating interrelationship of beliefs to provide meaning and content to other beliefs in set as basic coherentism).

82. 476 U.S. 267, 284 (1986) (O'Connor, J., concurring).

83. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 284 (1986) (O'Connor, J., concurring) (stating that issue of whether Constitution prohibits union and school board from developing plan apportioning layoffs between racial groups to preserve affirmative hiring policy requires court to define and apply equal protection clause standards).

84. *See id.* at 291 (O'Connor, J., concurring) (recognizing that states' duty to eliminate past effects of discrimination justifies voluntary race-conscious action to achieve compliance with law, even absent specific finding of past discrimination).

85. *Id.* at 292 (O'Connor, J., concurring).

86. *Id.* (O'Connor, J., concurring) (concluding that reference to Title VII standards guides states as to equal protection duties in employment context).

87. *See id.* (O'Connor, J., concurring) (making constitutional analysis exact duplicate of Title VII analysis when applied by state employers to guide equal protection issues).

88. *Id.* at 293-94 (O'Connor, J., concurring). Of course, whether a statute is violated in a given case may be a function of judge-made standards, as well as judicial attempts to determine the legislative intent underlying the statute. In any event, legislative or judicial standards putatively controlled by relevant constitutional standards are being used, directly or indirectly, to give meaning and content to the relevant constitutional provisions themselves.

be viewed as feeding back into Title VII jurisprudence, providing the only source of change in Title VII jurisprudence.[89] One suspects, however, that the statute is a reliable guide to the Constitution in part because our sense of what is permissible or required under the statute tends to have some effect on what we think the equal protection clause requires.

Justice Marshall's dissent in *Wygant* intimates the same coherentist logic,[90] expressing themes vaguely similar to Justice Scalia's analysis in *Burnham*.[91] In *Wygant*, Justice Marshall argued that:

> When an elected school board and a teachers' union collectively bargain a layoff provision designed to preserve the effects of a valid minority recruitment plan by apportioning layoffs between two racial groups, as a result of a settlement achieved under the auspices of a supervisory state agency charged with protecting the civil rights of all citizens, that provision should not be upset by this Court on constitutional grounds.[92]

Again, several reasons likely underpin Justice Marshall's disinclination to overturn on equal protection grounds affirmative action settlements arrived at in accordance with relevant civil rights statutes.[93] One such reason stems from the sense that what relevant civil rights statutes require or allow may or should affect a judgment of the scope and content of the equal protection clause.

3. Justice Brennan on the death penalty

Constitutional coherentism may also be detectable as a single element within a predominantly foundationalist analysis. Consider, for example, Justice Brennan's well-known concurring opinion in

---

89. *See generally* B. LINDMAN-SHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 983-1012 (2d ed. 1983) (discussing history of Civil Rights Acts). Congress passed Title VII pursuant to the commerce clause. 110 CONG. REC. 7202-12, 8453-56 (1964). *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 245-46 (1964) (citing legislative history to find Title VII valid exercise of commerce clause power). Congress subsequently amended Title VII in 1972 to extend its coverage to state and local government employees under the equal protection clause of the fourteenth amendment. *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (upholding 1972 amendments to Title VII as valid exercise of fourteenth amendment equal protection clause power over eleventh amendment state sovereignty); Shawer v. Indiana Univ. of Pa., 602 F.2d 1161, 1164-65 (3d Cir. 1979) (stating that Congress clearly extended Title VII to state and local government employees pursuant to fourteenth amendment).

90. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 295 (1986) (Marshall, J., dissenting).

91. *See supra* notes 49-64 and accompanying text (characterizing Justice Scalia's analysis of due process requirement, based on state and federal jurisdictional statutes, as coherentist because it involves interpretation by referring to mutually informative interrelationship between relevant set of rules).

92. *Id.* at 312 (Marshall, J., dissenting).

93. *See id.* at 303 (Marshall, J., dissenting) (focusing on history and application of settlement at issue to demonstrate its constitutionality, not on which standard should be applied).

Furman v. Georgia,[94] which considered whether and under what circumstances the death penalty violates the eighth amendment prohibition against cruel and unusual punishment.[95] The opinion's assertion that "[t]he primary principle [of the eighth amendment] is that a punishment must not be so severe as to be degrading to the dignity of human beings" illustrates the concurrence's foundationalist tenor.[96] As concluded above, this type of moral principle rests within foundationalist rather than within coherentist theory.[97] Justice Brennan believes this moral value to be a fundamental premise of the cruel and unusual punishment clause, rather than a subordinate or inferior principle of law.[98]

Much of the remainder of Justice Brennan's argument proceeds in similar foundationalist fashion.[99] At one point, however, Justice Brennan introduces a coherentist element. To determine whether a particular punishment violates the prohibition against cruel and unusual punishment, Justice Brennan considers contemporary society's acceptance or rejection of that particular punishment.[100] By itself, this argument is not necessarily coherentist, since acceptability to society might refer solely to popular moral attitudes or other foundationalist sources of law.[101] Justice Brennan, however, looks beyond those sources and specifies as one indicator of the contemporary acceptability of a punishment the extent of its statutory authorization.[102] Thus, Justice Brennan factors in the statutory

---

94. 408 U.S. 238, 257 (1972) (per curiam) (Brennan, J., concurring).

95. *See* Furman v. Georgia, 408 U.S. 238, 257 (1972) (Brennan, J., concurring) (seeking to hold death penalty unconstitutional as violation of eighth and fourteenth amendment's prohibition against cruel and unusual punishment).

96. *Compare id.* at 271 (Brennan, J., concurring) (providing primary principle behind eighth amendment analysis) *with* Annis, *supra* note 6, at 345-46 (defining foundationalism as certain self-evident fundamental beliefs from which non-basic beliefs are directly derived). *See also infra* notes 125-34 and accompanying text (describing foundationalist theory and its application to broader constitutional analysis and interpretation and positing Constitution as ultimate touchstone in adjudicating cases).

97. *See supra* notes 70-73 and accompanying text (discussing moral theory and law review articles and other legal scholarship as outside formal legal hierarchy and hence not example of coherentism).

98. *See Furman*, 408 U.S. at 273 (Brennan, J., concurring).

99. *See id.* at 271-82 (Brennan, J., concurring) (listing elements to be considered when evaluating whether punishment is cruel and unusual, including framers' intent, common notions of human dignity, severity and arbitrary nature of punishment, and its excessiveness).

100. *Id.* at 277 (Brennan, J., concurring).

101. *See* Van Cleve, *supra* note 6, at 74-76 (defining coherentism and foundationalism such that if beliefs form basis of rather than inform decisions in unprivileged fashion they express foundationalism); *see also supra* notes 70-73 and accompanying text (finding moral attitudes fall outside formal structure of legal rules and hence not coherentist elements within legal system).

102. *See Furman*, 408 U.S. at 279 (Brennan, J., concurring) (directing analysis toward legislative authorization of punishment practices but concluding that legislative authorization does not establish acceptance because acceptance is measured by use of punishment, not its mere technical availability).

existence of the punishment in other jurisdictions to decide its constitutionality.[103]

This inquiry is similar to the inquiry undertaken by Justice Scalia and, again only as a portion of the task, by Justice Brennan some years later in *Burnham*.[104] As a recognizably coherentist analysis, this examination establishes the contours and substance of a constitutional provision in part by referring to the statutes enacted pursuant to and held accountable under that provision.[105] This results in a blurring or reciprocality of any purported hierarchy of authority among the constitutional and statutory levels. Justice Brennan's concurring opinion in *Furman* confirms that constitutional coherentism is not simply a conservative device to validate the majority's interests by reference to statutes enacted by the majority's representatives and that constitutional coherentism arises in a variety of contexts.[106]

C. Griswold v. Connecticut: *Two Opinions Highlighting the Contrast*

With only mild exaggeration, no model of constitutional analysis deserves credit unless it discusses the well-known privacy case of *Griswold v. Connecticut*.[107] While much has been written about *Griswold*,[108] the distinction between foundationalism and coherentism

---

103. *See id.* at 278 (Brennan, J., concurring) (utilizing existence of punishment in other jurisdictions as factor in conjunction with historic use and acceptance of punishment method).

104. *See supra* notes 65-74 and accompanying text (reviewing Brennan concurrence in *Burnham* and noting coherentist view embodied in its consideration of jurisdictional statutes and practices).

105. *See* Sosa, *supra* note 13, at 18-20 (defining coherentism as examining beliefs within context of mutually supporting set or system wherein member beliefs interrelate and inform each other); Van Cleve, *supra* note 6, at 76-77 (explicating coherentism as interrelationship of beliefs within a mutually supporting system without hierarchical or fundamental structure). *Compare* Annis, *supra* note 6, at 345-46 (setting forth foundationalist theory wherein certain ideas form basis of system because of their self-evident nature).

106. *See generally* Bork, *supra* note 1, at 1-3 (advocating constitutional conservative approach by application of neutral principles rather than value-laden ones to mitigate anomaly of judicial supremacy in democratic society); Meese, *Toward a Jurisprudence of Original Intent*, 11 HARV. J.L. & PUB. POL'Y 5, 5-12 (1988) (characterizing conservative approach to constitutional analysis as one that assumes Constitution possesses discernable, intended meaning that must be relied upon when interpreting text, rather than as approach that views Constitution as text where meaning must be created by judges sensitive to social conditions or moral philosophies).

107. 381 U.S. 479 (1965) (holding statute forbidding use of contraceptives by married couples for contraceptive purposes violates right of privacy emanating from penumbra of guarantees contained in Bill of Rights).

108. *See, e.g.*, Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1421-22 (1974) (contending that reliance on penumbra of Bill of Rights to find privacy right is logically suspect and contrary to principles of legal drafting); Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981, 994 (1979) (arguing that penumbra theory tortured Bill of Rights into producing result, that Goldberg's reliance on ninth amendment was disingenuous given its history, and that White's and Harlan's application of substantive due process received historical vindication by adoption in later cases); Posner, *The Uncertain Protection of Privacy by the*

helps us account for the persistence of Justice Douglas' apparently methodologically radical majority opinion.[109]

In *Griswold*, Justice Douglas suggested that aspects of the first, third, fourth, fifth, and ninth amendments have "emanations" that form "penumbras" jointly establishing a constitutionally protected "zone of privacy."[110] The Court held that appellants' use of contraception was within the zone of protected activity and therefore struck down the statute prohibiting the use of contraceptives for specified purposes.[111] If Justice Douglas' opinion involved a completely novel or radical methodology, it would be difficult to account for its persistent influence. The distinction between foundationalism and coherentism, however, permits a vision of Justice Douglas' opinion as more traditional in some respects than Justice Goldberg's generally less controversial concurring opinion.[112]

In particular, Justice Douglas' approach, for all of its luminist metaphor, is much more purely and traditionally foundationalist than is Justice Goldberg's concurrence. In determining that appellants' activities received constitutional protection, Justice Douglas relied exclusively on established constitutional rights.[113] Those rights formed the sole basis for zone of privacy.[114] The broader range of possible sources of law played no role in creating a privacy right.[115] Most particularly, Justice Douglas never considered demarcating a constitutional privacy right through reference to statutory law.[116] In contrast, Justice Goldberg's concurrence was at least ambiguous

---

Supreme Court, 1979 SUP. CT. REV. 173, 198 (suggesting that opinion deserves credit for not applying substantive due process and relating right to contraceptives to familiar notions of privacy).

109. *See* Eisenstadt v. Baird, 405 U.S. 438, 452-55 (1972) (extending privacy right to hold unconstitutional statute banning distribution of contraceptives to unmarried people); *see also* Roe v. Wade, 410 U.S. 113, 152-53 (1973) (explaining that fundamental right to privacy created in *Griswold* was broad enough to encompass woman's decision to terminate pregnancy). *But see* Bowers v. Hardwick, 478 U.S. 186, 190-94 (1986) (refusing to recognize constitutional privacy protection for consensual adult sexuality between gay men).

110. *See* Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965) (looking in particular at such Bill of Rights protections as free speech, press, thought, and association; right against enforced quartering of soldiers; right to be secure in person, house, papers, and effects; freedom from unreasonable searches and seizures; and protection against self incrimination).

111. *See id.* (finding constitutional violation at any time statute infringes upon protected activities).

112. *See id.* at 486-92 (Goldberg, J., concurring) (relying exclusively on ninth amendment as creating fundamental rights not explicitly enumerated in first eight amendments and reserving those rights to populace).

113. *See id.* at 481-85 (building right of privacy from aspects of various constitutional amendments without reference to other sources of rights).

114. *Id.*

115. *Id.*

116. *Id.* This approach follows foundationalism because the opinion accepts the basic ideas, here constitutional rights, as given and builds a new idea (the privacy right) from that foundation. Annis, *supra* note 6, at 345-46.

about a coherentist approach to the constitutional right of privacy.[117] Justice Goldberg argued for the need to look beyond constitutional penumbras to "traditions"[118] and to our collective "experience with the requirements of a free society."[119] He concluded that "the right of privacy is a fundamental personal right, emanating 'from the totality of the constitutional scheme under which we live.' "[120]

By referring to the "totality of the constitutional scheme," Justice Goldberg may conceivably have meant to invoke only constitutional provisions. This interpretation, however, only leaves room for "traditions" and "experiences" at the explicitly constitutional level. Justice Goldberg's language offers little support for such a narrow interpretation.[121] A more natural reading of the phrase includes reference to federal and state statutory and regulatory enactments, if not to other possible sources of law, to illuminate the constitutional scheme.[122]

---

117. *See id.* at 486 (Goldberg, J., concurring) (basing invalidation of statute on notion that ninth amendment allows for existence of other constitutional rights, determined by referring to society's traditions and collective experience). Justice Goldberg's opinion maintains that the framers of the Constitution never intended the Bill of Rights to be an exhaustive list of citizens' rights. *Id.* at 487. Rather, the framers' inclusion of the ninth amendment expressly reserves those rights not enumerated to the people. *Id.* at 487-88.

118. *Id.* at 493 (Goldberg, J., concurring). References to "traditions" to help establish the content of the due process clause have also been reasonably common, but most of the best known of these cases never even implicitly commit to any degree of coherentism. *See, e.g.*, Rochin v. California, 342 U.S. 165, 169 (1952) (holding involuntary stomach pumping for narcotics violates due process by reliance on traditional due process guarantee of respect for personal immunities); Palko v. Connecticut, 302 U.S. 319, 325 (1937) (upholding statute allowing state to appeal criminal verdicts partly due to prohibition against prosecution without indictment not being fundamental principle of justice rooted in traditions and conscience of people), *overruled on other grounds*, Benton v. Maryland, 395 U.S. 793, 794 (1969); Snyder v. Massachusetts, 291 U.S. 97, 105 (1934) (requiring defendant's presence during felony prosecution under due process clause because of compelling tradition favoring confronting one's accusers). *But see Rochin*, 342 U.S. at 171 (referring to, among other considerations, "compelling traditions of the legal profession" to describe content of due process clause). Presumably, the traditions of the legal profession, as a source of the content of the due process clause, would include statutory and regulatory elements.

119. *Griswold*, 381 U.S. at 493 (Goldberg, J., concurring) (quoting Poe v. Ullman, 367 U.S. 497, 517 (1961) (Douglas, J., dissenting) (suggesting that judges must look to traditions and collective conscience of populace when determining which rights are fundamental)).

120. *Id.* at 494 (Goldberg, J., concurring) (quoting *Ullman*, 367 U.S. at 521 (Douglas, J., dissenting)). Thus, the exclusively foundationalist character of Justice Douglas' opinion in *Griswold* does not necessarily manifest an unequivocal commitment to reject constitutional coherentism. *Compare Griswold*, 381 U.S. at 481-85 (Douglas, J.) (creating zone of privacy from text of constitutional amendments) *with Ullman*, 367 U.S. at 521-22 (advocating reference to broader constitutional scheme in arguing that anti-contraceptive statute was unconstitutional in case majority held lack of case or controversy). Justice Douglas' use of this phrase in *Ullman* leaves unclear whether he intended to include statutory and regulatory strata within "the totality of the constitutional scheme." *See Ullman*, 367 U.S. at 521 & n.13 (Douglas, J., dissenting).

121. *See Griswold*, 381 U.S. at 486 (Goldberg, J., concurring) (seeming to suggest that analysis requires view towards traditions outside of constitutional context).

122. *See* Kauper, *Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten:*

The most natural reading of Justice Goldberg's opinion, therefore, suggests that the existence and contours of a constitutional right of privacy should be determined in part by considering the content of relevant statutory and regulatory enactments.[123] This method of constitutional evaluation therefore amounts to a coherentist approach.[124] Justice Douglas' generally more methodologically controversial approach provides the traditional foundationalist foil to Justice Goldberg's less traditional coherentism.

Overall, it is safe to conclude that coherentism, in one form or another, appears as a common feature in important contemporary constitutional jurisprudence. The method's use by judges, however, fails to prove its inherent logic or normative value, in light of the hierarchical structure and self-justifying presuppositions of the constitutional system. Furthermore, even if constitutional coherentism is jurisprudentially and logically sound, its potential advantages should be clarified.

Initially, constitutional coherentism may not seem promising. Constitutional coherentism might appear viciously circular and incompatible with our sense that constitutional principles establish the "foundation" upon which statutes must be grounded. As it turns out, however, further examination of foundationalism and coherentism in other contexts suggests a strong case for the logic, legitimacy, and advantageousness of constitutional coherentism.

II. FOUNDATIONALISM AND COHERENTISM IN THE BROADER PERSPECTIVE

A. Foundationalism in the Legal System

Initially, the foundationalist model appears most naturally related to the judicial process of arriving at correct or justified results in constitutional cases.[125] Consider, for example, the view that

---

The Griswold *Case*, 64 MICH. L.J. 235, 244-46 (1965) (discussing Justice Goldberg's belief that ninth amendment shows framers' intent to protect fundamental rights although not enumerated in first eight amendments); Redlich, *Are There "Certain" Rights . . . Retained By the People*, 37 N.Y.U. L. REV. 787, 793-98 (1972) (tracing framers' intent behind ninth amendment and praising Goldberg's use of it in *Griswold*).

123. *See* Redlich, *supra* note 122, at 797-98 (noting that various sources help guide interpretation of rights left to citizens under ninth amendment).

124. *See* Sosa, *supra* note 13, at 18-20 (stressing importance of mutually supporting ideas in coherentist framework); Van Cleve, *supra* note 6, at 76-77 (same).

125. *See* Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331, 1334 (1988) (noting that foundationalism is prevailing approach in constitutional scholarship, but criticizing foundationalism as non-viable because there are no objectively verifiable foundations); Farber & Frickey, *Practical Reason and the First Amendment*, 34 U.C.L.A. L. REV. 1615, 1617-27 (1987) (discussing scholars who apply foundationalist approach to first amendment and argue

foundationalism "supposes that knowledge forms a structure, most components of which are supported by a certain sub-set of components that are not themselves supported by the former."[126] Foundationalism "holds that some of one's beliefs 'depend on' others for their current justification; these other beliefs may depend on still others, until one gets to foundational beliefs that do not depend on any further beliefs for their justification."[127]

The analogy between foundationalism and the structure of our legal system seems obvious. Constitutional provisions or propositions act as the bases or foundations upon which other legal norms, such as those embodied in statutes and regulations, depend for justification.[128] Of course, it stretches the analogy too far to suppose that all of the Constitution's provisions are genuinely self-justifying, self-evidently true, incorrigible, or indubitable. It is hardly self-evident, for example, that the Constitution should mandate a minimum age for the President, or that such an age should be neither lower nor higher than thirty-five years.[129] But foundationalism, in some versions, neither requires nor claims that the basic or foundational principles must be self-evident or indubitable.[130] Some judges

---

that first amendment has single unifying purpose from which answers to such issues may be deduced); *see also supra* notes 34-39 and accompanying text (relating Supreme Court use of foundationalist model in decisionmaking).

126. Alston, *Has Foundationalism Been Refuted?*, 29 PHIL. STUDIES 287, 289 (1976) (providing definition of epistemological foundationalism in admittedly unspecific terms); *see also* Alston, *supra* note 6, at 165 (according to foundationalism certain beliefs ("foundations") justified outside any relationship to other justified beliefs, while other beliefs interrelate and ultimately depend for justification on "foundations").

127. G. HARMAN, *supra* note 29, at 29 (asserting that foundationalism imposes no requirement of tracking original justifications for beliefs, whereas coherence theory does); *see also* Annis, *supra* note 6, at 345 (defining traditional epistemic foundationalism as positing "various self-justified or basic statements" from which nonbasic statements derive in direct linear relationship); Bonjour, *Can Empirical Knowledge Have a Foundation?*, 15 AM. PHIL. Q. 1, 1 (1978) (stating thesis of epistemological foundationalism as "certain empirical beliefs possess[ing] a degree of epistemic justification or warrant which does not depend, inferentially or otherwise, on the justification of other empirical beliefs, but is instead somehow immediate or intrinsic"); Van Cleve, *supra* note 6, at 74 (positing foundationalism as "class of propositions—the 'foundations'—that are self-evident or immediately justified; and . . . every proposition that is justified is so at least partly in virtue of standing in certain relations to the foundations").

128. *See supra* notes 34-39 (discussing application of foundationalism by Supreme Court within structure of legal system).

129. *See* U.S. CONST., art. II, § 1, cl. 5. For present purposes we set aside the question of the extent of indeterminacy of this legal requirement. *See* Hutchinson, *Democracy and Determinacy: An Essay on Legal Interpretation*, 43 U. MIAMI L. REV. 541, 543 (1989) (arguing that all law lacks determinacy and objectivity).

130. *See* Alston, *supra* note 126, at 289 (stating that while some foundationalists assert that foundations are incorrigible, minimalists define theory as not requiring self-evident foundation beliefs); Alston, *supra* note 6, at 185 (averring that foundationalism divested of claims of infallibility or incorrigibility is most defensible); Audi, *supra* note 30, at 180 (asserting that foundational values require no absoluteness or highly privileged justificatory status); Triplett, *Recent Work on Foundationalism*, 27 AM. PHIL. Q. 93, 98 (1990) (finding that basics require certain degree of justification, but no more so than the propositions they justify). *But see generally* Kekes, *An Argument Against Foundationalism*, 12 PHILOSOPHIA 273 (1983) (claiming that founda-

may suggest that their oath and scope of responsibility bind them to decide cases only in accordance with the Constitution and not necessarily to determine the justification, self-evident or not, of the relevant aspect of the Constitution.[131] This view, however, misperceives constitutional foundationalism. Under foundationalist theory, judges need not pass on the self-evidently correct or self-justifying nature of the presidential age requirement. Rather, foundationalism requires the judge simply to assume the Constitution as the ultimate touchstone of justification for purposes of adjudicating a given case.[132] Whether the Constitution itself attains justification in some ultimate sense remains the task of legal philosophers, not judges deciding particular cases.[133]

The model of foundationalism, then, seems applicable to the extent that our legal system is analogous to a brick wall, with a constitutional layer as the "solid foundation supporting layer after successive layer."[134] To the extent that this analogy seems imperfect, or at least incomplete, the model of coherentism may be of interest.

B. Coherentism in the Legal System

Coherentism generally refers to the view which accords the ultimate source of justification for any belief to the relationship between and among all beliefs held by the believer.[135] Coherentism looks in particular to explanatory relations or relations of probability or logic between or among beliefs.[136] In essence, coherentism holds that a belief receives justification wholly from its place

---

tionalism is committed to claim that incorrigible statements exist); Williams, *Coherence, Justification, and Truth*, 34 REV. METAPHYSICS 243 (1980) (noting that foundationalism essentially requires existence of "intrinsically credible" or "directly evident" beliefs capable "to serve as ultimate terminating points for chains of justification").

131. *See* Farber, *supra* note 125, at 1332 (concluding that courts' practical need to resolve constitutional cases and controversies prevails over any desire to supply theoretical justification for decisions).

132. *Id.* (asserting that courts need not and do not rely on grand theoretical foundations to justify decisions).

133. *Id.*

134. Rescher, *Foundationalism, Coherentism, and the Idea of Cognitive Systematization*, 71 J. PHIL. 695, 698 (1974) (analyzing and contrasting foundationalism and coherentism as theories of cognitive rationalization); *see also* R. NOZICK, PHILOSOPHICAL EXPLORATIONS 3 (1981) (critiquing epistemological foundationalism because it is like pile of bricks in that removing one bottom brick topples whole including insights derived independent of that starting point). For further discussion of foundationalism by a leading contemporary proponent, see generally Chisholm, *A Version of Foundationalism*, in 5 MIDWEST STUDIES IN PHILOSOPHY: STUDIES IN EPISTEMOLOGY 543 (P. French, T. Uehling & H. Wettstein eds. 1980) (asserting that foundationalism means that first person propositions are actually direct attribution of properties to speaker from basic touchstones).

135. Sosa, *supra* note 13, at 18 (defining coherentism by comparing it to foundationalism).

136. *Id.*

within a coherent system.[137] Coherentism thus requires some account or definition of "coherence."[138]

We all hold certain ideas about what coherence means. Judges recognize and think desirable the idea of coherence in the law.[139] At a first approximation, the concept of coherence seems clear enough. The degree[140] of coherence of a system of beliefs, norms, or rules reflects such factors as the system's simplicity,[141] comprehensiveness or generality,[142] fecundity,[143] lack of internal conflict[144] or internal inconsistency,[145] refutability,[146] internal organization,[147] and the lack of any ad hoc quality to the system's explanations.[148]

---

137. Dancy, *On Coherence Theories of Justification: Can an Empiricist Be a Coherentist?*, 21 AM. PHIL. Q. 359, 359 (1984) (addressing definition of coherentism in context of debates within coherentist school); *see also* Van Cleve, *supra* note 6, at 76 (explaining coherentism as asserting that propositions become justified by membership in coherent system of beliefs, none of which is self-evidently justified). For extended accounts of coherentism, see N. RESCHER, THE COHERENCE THEORY OF TRUTH 23-24 (1982) (characterizing aim of coherence theory as affording test or criterion of truth, not actually defining truth); R. WALKER, *supra* note 33, at 210 (opining that coherent system should be set of beliefs, not solely set of abstract propositions); M. WILLIAMS, GROUNDLESS BELIEF: AN ESSAY ON THE POSSIBILITY OF EPISTEMOLOGY 5-7 (1977) (raising question of whether epistemology constitutes coherent intellectual discipline).

138. *See* Dancy, *supra* note 137, at 354 (explaining "mutual explanatoriness" is condition of coherent set); *see also infra* notes 141-50 and accompanying text (discussing elements of coherent system of beliefs, norms, or rules).

139. *See* Patterson v. McLean Credit Union, 109 S. Ct. 2363, 2396 (1989) (Stevens, J., concurring in part and dissenting in part) (dissenting because majority, while averring its adherence to logic and coherence, instead strays from previously laid foundations) (quoting B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 149 (1921)); Runyon v. McCrary, 427 U.S. 160, 190-91 (1976) (Stevens, J., concurring) (noting societal need for stable and orderly development of law and hence advocating adherence to precedent and use of one statute to interpret related statute).

140. *See* Bonjour, *The Coherence Theory of Empirical Knowledge*, 30 PHIL. STUDIES 281, 288 (1976) (finding generally that coherence is matter of degree).

141. *See, e.g.*, G. HARMAN, *supra* note 29, at 29 (stating that to achieve coherence in belief system one must simplify, organize, and reduce ad hoc nature of beliefs); P. ZIFF, EPISTEMIC ANALYSIS 42-43 (1984) (believing coherence to be issue of logical structure with principle of identity supplying relevant aspect of logical structure when it is questioned); Cornman, *supra* note 26, at 293 (surveying factors comprising coherent belief system); Lipkin, *supra* note 3, at 868 (listing factors that lend coherence to belief system and stressing simplicity and fecundity of system).

142. *See, e.g.*, D. BRINK, MORAL REALISM AND THE FOUNDATIONS OF ETHICS 103 (1989) (stressing comprehensiveness and generality of belief system in achieving consistency); Cornman, *supra* note 26, at 293 (noting comprehensiveness, simplicity, and fecundity as keys to coherent belief system); Lipkin, *supra* note 3, at 868 (holding that greater comprehensiveness of issues addressed by belief system achieves greater coherence of that system).

143. Cornman, *supra* note 26, at 293; Lipkin, *supra* note 3, at 868.

144. *See* Lehrer, *The Coherence Theory of Knowledge*, 14 PHIL. TOPICS 5, 9 (1986) (commenting that systems with internal conflict rarely exhibit coherence unless that conflict is minimal).

145. *See* Lehrer, *Coherence and the Racehorse Paradox*, in 5 MIDWEST STUDIES IN PHILOSOPHY: STUDIES IN EPISTEMOLOGY 183, 190 (P. French, T. Uehling & H. Wettstein eds. 1980) (explaining that systems should seek consistency over variety of situations to increase overall coherence).

146. Cornman, *supra* note 26, at 293.

147. G. HARMAN, *supra* note 29, at 29.

148. *See id.* (noting that ad hoc decisions reduce consistency, comprehensiveness, and organization of belief system because of reactive, unthoughtful nature).

When a system possesses a number of these factors to a great degree, that system may be classified as elegant or beautiful.[149] A coherent relationship between and among a network of beliefs or rules, legal or otherwise, thus involves more than mere consistency, but something less than rigorous logical entailment.[150]

In the specifically legal context, a judge engages in constitutional coherentism to the extent that she relies on and considers the above assumptions when deciding constitutional cases.[151] A coherentist approach, therefore, legitimizes an interpretation of a constitutional provision, such as the due process clause,[152] that arises at least in part from considering statutes and regulations implicating the particular constitutional provision.[153] In coherentism, the relationship between the due process clause and the statutes and regulations challenged thereunder conforms not to the idea of foundation and superstructure, or strict hierarchy, but of non-privileged status.[154] Just as an individual's reactions to a constitutional provision affect

149. Lipkin, *supra* note 3, at 868.

150. *See* Kress, *supra* note 27, at 370 (delimiting coherence as more strict than logical consistency but less exacting than absolute mutual entailment); Plantinga, *Coherentism and the Evidentialist Objection to Belief in God*, in RATIONALITY, RELIGIOUS BELIEF, AND MORAL COMMITMENT 109, 129 (R. Audi & W. Wainwright eds. 1986) (agreeing with general outer limits but noting that coherentists refine definition further); Note, *Dworkin's Right Answer Thesis: A Statistical Regression Coherence Model*, 73 IOWA L. REV. 159, 167 (1987) (finding coherence theory to include relationships between elements of different sets of beliefs whereas legal theory limited to narrow use of relationships between elements of same set). For discussion of the problem of achieving even mere consistency among decisions facing both foundationalist and coherentist models of judicial decisionmaking, see generally Easterbook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802 (1982) (stating that inconsistent decisions must, on minimal assumptions, be expected in light of multi-member composition of Court).

151. *See, e.g.*, Burnham v. Superior Court, 110 S. Ct. 2105, 2115 (1990) (using coherentist approach to find consistency between due process clause and legal system's traditions); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 292 (1986) (O'Connor, J., concurring) (applying coherentist approach by arguing that conditions satisfying Title VII pattern or practice are reliable "benchmark" of equal protection clause for employer discrimination issues, thereby finding consistency between Constitution and statute); Furman v. Georgia, 408 U.S. 238, 277 (1972) (Brennan, J., concurring) (finding harmony between values inherent in eighth amendment prohibition of cruel and unusual punishment and political process in enacting statutes); Trop v. Dulles, 356 U.S. 86, 101 (1958) (marking test for eighth amendment as drawing on evolving standards of society); *see also supra* notes 34-124 (discussing at length these decisions as evidence of coherentism in constitutional adjudication).

152. *See supra* notes 41-69 and accompanying text (describing various uses of coherentism in Supreme Court due process cases).

153. *Cf.* Kress, *supra* note 27, at 370 (noting coherence achieved when beliefs fit within system to certain level of consistency and entailment); *supra* notes 135-38 and accompanying text (defining coherentism as justification of proposition based on its relationship to coherent system of propositions). Thus, under a coherentist approach, where no proposition or belief assumes primacy, a constitutional provision takes its meaning and scope from the system of other constitutional provisions and the statutes and regulations to which it relates. *See supra* notes 75-93 and accompanying text (explicating coherentist approach used by Supreme Court in affirmative action between equal protection clause and Title VII).

154. *See supra* notes 63-64 and accompanying text (arguing that statutes' substantive content helps define fair play and substantial justice requirements, which in turn informs substantive content of due process clause).

the ultimate interpretation or assessment of the related statutes and regulations, so may the reaction to statutes and regulations legitimately influence the interpretation of inescapably broad,[155] "open-textured,"[156] if not largely indeterminate,[157] constitutional provisions. The coherentist's result in a particular case seeks to provide the most satisfactory accommodation of the factors noted above,[158] recognizing and adopting the best "fit" into the system created by the constitutional provision and its related statutes and regulations.[159]

C. Criticism of Constitutional Coherentism and Responses

This understanding of coherentism provides the basis for responding to three criticisms of constitutional coherentism. The first critique contemplates an "insane" legal system which, as in a paranoid nightmare, possesses all the requisite legal elements—regulations, statutes, a constitution—that mutually support each other with elaborate and detailed relationships, but is nevertheless completely insane or morally depraved.[160] A second critique is derived from the possibility that constitutional coherentism may not generate unique results in particular cases.[161] Conflicting judicial results

---

155. *See* Michael H. v. Gerald D., 109 S. Ct. 2333, 2350 (1989) (Brennan, J., dissenting) (describing liberty and property as broad ideas, gathering meaning from experience and analysis) (quoting Board of Regents v. Roth, 408 U.S. 564, 571 (1972) and National Ins. Co. v. Tidewater Co., 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting)).

156. *See* H.L.A. HART, THE CONCEPT OF LAW 121-32 (1961) (arguing that general rules, principles, and standards must be main instrument of social control in large society).

157. *See* Hutchinson, *supra* note 129, at 543 (discussing indeterminacy of law in constitutional context and noting swings in Supreme Court jurisprudence as evidence).

158. *See supra* notes 141-48 and accompanying text (listing factors lending belief system coherence, including simplicity, comprehensiveness, and internal consistency).

159. *See* Hurley, *supra* note 23, at 223 (characterizing judges' task as discovering theory displaying most coherence); *see also* Dworkin, *"Natural" Law Revisited*, 34 U. FLA. L. REV. 165, 170 (1982) (maintaining that valid interpretations "fit" data they are designed to interpret); Hittinger, *Liberalism and the American Natural Law Tradition*, 25 WAKE FOREST L. REV. 429, 498 (1990) (asserting that claim of existence of natural law requires assessment in light of judicial precedents to determine its fit); Rescher, *supra* note 134, at 700 (claiming that nothing has to be more fundamental than another thing as long as there is over-all fit, where every element of the system interlocks with other elements). For a critique of Professor Dworkin's approach in particular, see generally Fish, *Working on the Chain Gang: Interpretation in Law and Literature*, 60 TEX. L. REV. 551 (1982) (agreeing generally with Dworkin's theory of legal interpretation but arguing that Dworkin often strays from his own arguments with fallacies of pure objectivity and pure subjectivity).

160. *See, e.g.*, Kornblith, *supra* note 25, at 601 (noting that mere fact of coherence between propositions does not evidence their truth); Sosa, *Beyond Scepticism, to the Best of Our Knowledge*, 97 MIND 153, 167 (1988) (establishing main objective of coherentism as providing ability to create coherent beliefs that lack relation to individual surroundings); Sosa, *The Foundations of Foundationalism*, 14 NOUS 547, 557 (1980) [hereinafter Sosa, *Foundations*] (referring to "problem of detachment from reality" in which coherent beliefs may be detached from surroundings and thus justification for set of beliefs may be internal).

161. *See* Cornman, *supra* note 26, at 296 (stating that by nature, singular observations are all tested by similar observation and this leads to identity of results, even in slightly different

in a particular case conceivably might be equally coherent with the other elements of the legal system, but in different ways.[162] Finally, coherentism may seem viciously circular because it justifies a statute in part by reference to the Constitution, and justifies the Constitution in part by reference to the statute.[163]

By way of response, several points might be made. As to the second criticism, regarding the possibility of equally coherent case law outcomes, we must first be realistic in our expectations. Certainly foundationalism has failed to generate uniquely correct answers to questions of equal protection, due process, free exercise of religion, or the right of privacy.[164] Coherentism offers no less than what can reasonably be expected: if two interpretations of a constitutional provision seem equally coherent, we can either reconsider the strength of our commitment to each element or strand of the network of justification or consider some as yet unexamined element from the system.[165]

The problems of allegedly vicious circularity and of the possibility of a perfectly coherent but "insane" legal system can be treated together. First, the possibility of mutually supporting legal principles fails as reasonable grounds to dismiss constitutional coherentism.[166] That would simply beg the question against coherentism. Critics must demonstrate why this "circularity" is vicious or why it amounts to no support at all under actual conditions. Second, coherentism as used in constitutional case law need never exclude foundationalism.[167] Coherentism may be unsuitable or unnecessary to solve a particular constitutional problem, or the particular context may call for supplementing a coherentist approach with a foundational ap-

---

circumstances); Sosa, *Foundations, supra* note 160, at 557 (referring to multiplicity of coherent systems which may nonetheless lead to identical outcomes in certain situations).

162. *See* Sosa, *Foundations, supra* note 160, at 557 (describing multiplicity of coherent systems leading to different outcomes under auspices of one general system); *see also supra* notes 49-69 (discussing opinions of Justices Scalia and Brennan in *Burnham* as using coherentist analysis but reaching opposite results).

163. *See* Michael H. v. Gerald D., 109 S. Ct. 2333, 2341 n.2 (1989) (using statutes as indicator of whether interest traditionally protected); Furman v. Georgia, 408 U.S. 238, 279 (1972) (Brennan, J., concurring) (arguing that violations of eighth amendment prohibition against cruel and unusual punishment should be determined in part by whether majority of state statutes provide for such punishment). *Compare infra* note 171 and accompanying text (asserting that coherentism's circularity is not vicious because it receives external validation).

164. *See* Farber, *supra* note 125, at 1338-39 (finding flaw in constitutional foundationalism because of difficulty in ascertaining intended scope of various constitutional provisions).

165. *See* Bonjour, *supra* note 140, at 302-03 (observing that coherent system may be made incoherent by subsequent input of experiences).

166. *See infra* note 171 and accompanying text (explaining that coherent system may receive external verification).

167. *See supra* notes 41-106 and accompanying text (discussing Supreme Court use of coherentism in due process and affirmative action contexts and noting that some justices use foundationalism, while others employ coherentism).

proach, or vice versa.[168] Sometimes, the content of a constitutional requirement in a particular case may be sufficiently clear on the basis of social or moral theory and the text of the Constitution itself.[169]

In addition, constitutional coherentism need not deny the possibility, or even the need, for justification of its results that is external to the legal system. A set of legal rules may be internally coherent,[170] but that fact hardly precludes further testing of the system by reference to some external standard. Potential benchmarks for analysis include purely ethical beliefs or principles, the degree to which the legal system fulfills social desires, or general beliefs about human nature and social facts generally.[171] Seeking external justification directly responds to those who insist on simultaneously challenging many or all of the mutually supporting beliefs or rules of the system. Thus, the legitimacy of looking outside the legal system reduces the fear of a coherent, but insane legal system or of a legal system absurdly holding itself up only by its own bootstraps.[172]

However, even an admixture of coherentism may be thought illegitimate because of the stratification inherent in the legal hierarchy.[173] Some legal writers therefore assume that constitutional decisionmaking must be exclusively foundationalist.[174] This view misconstrues constitutional coherentism, which receives legitimacy and justification from its recognition of the "open-texture" or the

---

168. *Compare supra* notes 35-37 and accompanying text (discussing foundationalism as most obvious approach adjudicating challenge to anti-pornography statute) *with supra* notes 94-103 (describing Justice Brennan's concurrence in Furman v. Georgia, 408 U.S. 238 (1972) as supplementing foundationalist approach with coherentism).

169. *See generally* Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865 (1960) (arguing that scope of free speech clause is clear from its language). Unfortunately, the text does not go on to indicate what is and what is not defined as "speech." *See* R.G. WRIGHT, THE FUTURE OF FREE SPEECH LAW ch. 1 (1990) (theorizing that scope of free speech clause is determined by broad range of norms or values coherently underlying that clause).

170. *See* G. HARMAN, *supra* note 29, at 33 (claiming that by nature, coherence of beliefs means those beliefs are mutually supporting).

171. *See* Rescher, *supra* note 134, at 706 (arguing that coherentism's circularity is not vicious because justification comes from both system-internal and system-external validations which support whole network).

172. *See* Rescher, *supra* note 134, at 706-07 (concluding that external justification validates internally consistent system by acting as reference point).

173. *See supra* notes 135-38 and accompanying text (advancing various definitions of coherentism, and noting that basic assumption posits justification of belief or rule as stemming from place in coherent, mutually supporting set or system of beliefs).

174. *See* Bork, *Styles in Constitutional Theory*, 26 S. TEX. L.J. 383, 387 (1985) (referring to accepted premises, logical demonstrations, and more basic principles as roots of constitutional theory); *see also* Williams v. Florida, 399 U.S. 78, 109 n.2 (1970) (Black, J., concurring in part and dissenting in part) (looking at specific language of constitutional provision and framers' intent); Berger v. New York, 388 U.S. 41, 87 (1967) (Black, J., dissenting) (identifying Court's duty as carrying out framers' intent).

partial indeterminacy of constitutional language.[175] Coherentism does not propose to turn the legal system on its head by generally subordinating constitutional rules to statutory rules.[176] Coherentism seeks only to make the best possible sense out of the legal system as a whole.[177]

D. Advantages of Coherentism

Upon reflection, then, the legitimacy of coherentism's role in constitutional adjudication may seem well-established. Constitutional coherentism might be legitimate, however, without being particularly advantageous. As we shall see, constitutional coherentism promises some affirmative advantages, and the avoidance of obvious pitfalls.

As a practical matter, a full accounting of the merits of constitutional coherentism extends beyond the scope of this Article. Some of constitutional coherentism's advantages derive from the general benefits of epistemic coherentism. The recent literature in this field generally supports coherentism's preeminence over foundationalism.[178] Of course, some of the disadvantages of epistemic foundationalism may not apply to constitutional foundationalism,[179] and coherentism is not universally admired.[180] A global assessment of coherentism versus foundationalism, then, is not possible within the scope of this Article.

Perhaps the most obvious and important advantage of constitutional coherentism, however, comes from its usefulness in legiti-

---

175. *See supra* notes 155-57 and accompanying text (noting ambiguity and broad nature of many constitutional provisions).

176. *See supra* notes 155-59 and accompanying text (asserting that as constitutional provisions give meaning to statutes, reactions to statutes may legitimately affect interpretation of constitutional principles); *see also supra* note 64 and accompanying text (discussing mutual relationship between statutes and values underlying due process clause).

177. *See supra* notes 158-59 and accompanying text (arguing that right result in case is most coherent one, or one providing best fit).

178. *See, e.g.*, Bonjour, *supra* note 127, at 13 (concluding that "foundationalism appears to be doomed"); Cornman, *supra* note 26, at 287 (finding himself virtually lone defender of foundationalism); DePaul, *supra* note 31, at 619 (recording coherentism's emergence as dominant approach in modern ethics); Kress, *supra* note 27, at 369 (noting predominance of coherence and holistic theories of philosophy and waning of foundational empiricist theories); Sosa, *supra* note 13, at 6 (expressing coherentism's recent vigor and interest in philosophical circles); Triplett, *supra* note 130, at 93 (stating that contemporary philosophers believe foundationalism is dead); *see also* R. POSNER, *supra* note 23, at 462 (referring to attack on "foundations" of various thought systems).

179. *See* Bonjour, *supra* note 127, at 13 (raising problem of self-evident justification of certain beliefs for foundationalism as epistemic theory). Constitutional foundationalists never need face this issue because the Constitution is assumed, within the legal system, to be the self-justified or at least unquestioned source of rules.

180. *See* Sayre-McCord, *Coherence and Models for Moral Theorizing*, 66 PAC. PHIL. Q. 170, 170 (1985) (arguing that requirement that theories be coherent insures theories' incorrectness).

mately restraining judicial arbitrariness and subjectivity. This possibility manifests itself through coherentism's utilization of the presumably more democratic influences of statutes and regulations in resolving issues, without sacrificing the function of the Constitution to safeguard minorities against the tyranny of the majority. Judges already interpret, or give content to, constitutional clauses in part via recourse to sources such as law review articles.[181] A recent, commonly enforced statute generated by the democratic process may present an equally valid basis for constitutional interpretation. In certain situations, of course, determining the scope and substance of a right by reference to majority desires defeats the purpose of constitutional rights.[182] But these occasions merely limit the justifiable use of the model, or the influence of statutes under the model, rather than totally invalidating its use.

Constitutional coherentism potentially restrains arbitrariness on the part of the judiciary without simply substituting the tyranny of the majority.[183] It might still be thought, though, that the coherentist model involves illegitimate methodological, if not political, conservatism.[184] This critique revolves around coherentism's call upon judges to fit case results into the overall structure of previously established law.[185]

In response, it should first be remembered that non-conservative judges reach non-conservative results by employing constitutional coherentism.[186] In addition, while epistemic coherentism struggles

---

181. *See supra* note 71 and accompanying text (noting Charles Reich's law review article that informed decision in *Goldberg v. Kelly*).

182. *See* J. ELY, DEMOCRACY AND DISTRUST 135-79 (1980) (defending countermajoritarian function of Constitution and courts as check on tyranny by majority and protection for minority rights); *see also* Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1508 (1990) (asserting that judicial review should counter majoritarianism and considering in this light how courts should decide constitutional challenges to voter enactments); Mitchell, *The Ninth Amendment and the "Jurisprudence of Original Intention"*, 74 GEO. L.J. 1719, 1742 (1986) (concluding principle that court protects minorities against majority is embodied in ninth amendment); THE FEDERALIST No. 51, at 323 (J. Madison) (C. Rossiter ed. 1961) (setting forth importance of guarding against both oppression by rulers and oppression of one portion of society by another). For some possible limits on the extent to which we might want to appeal to "dead" or "obsolete" statutes, see generally G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982) (discussing how unrepealed but obsolete statutes may excessively inform our inquiry into law on particular subjects).

183. *See supra* notes 41-106 and accompanying text (asserting that constitutional coherentism works within system of jurisprudential values, within which at least some constitutional values may be given great credence and great weight).

184. *See supra* notes 41-124 and accompanying text (explicating constitutional coherentism as attempt to determine meaning of constitutional provisions by reference to existing law and tradition).

185. *Id.*; *see also* Hurley, *supra* note 23, at 239 (characterizing coherentism as possessing element of conservatism because if case fits within coherent system of settled cases, it is deemed correctly decided, because settled cases set standard).

186. *See supra* notes 65, 92, 102-03, 118-20 and accompanying text (providing instances of

to accommodate the possibility of each relevant principle being simultaneously incorrect,[187] and the need to detect that state of affairs, legal coherentism should not be condemned because of that problem.[188] It is simply implausible that each and every legal principle, at every level of the legal system, is in fact simultaneously wrong, thereby disabling coherentism from detecting that state of affairs.[189] It seems noteworthy that even the philosopher Richard Rorty, whose disdain for traditional epistemology and traditional moral and legal theory is well-established, ultimately adopts moral and legal preferences not dissimilar to those of John Stuart Mill.[190] Constitutional coherentism provides for the possibility of rapid and fundamental political and legal change. It may be that in a given case, our sense of the injustice of a given outcome could be strong enough to override the fact that the outcome coheres well with many prior decisions and with other statutes.

Finally, to attain acceptance, constitutional coherentism must not beg important and controversial questions. The rejection by coherentism of the privilege or special status of beliefs or rules in a hierarchical sense may seem ominous to some. Doesn't coherentism preclude, from the beginning, even the possibility of a rule's objectively being right or true? While it would take us far afield to answer this important question, the brief, decisive answer seems to be "no."[191] Just as at least some forms of foundationalism deny the objectivity of truth,[192] so coherentism is compatible with the objectivity.[193] Therefore, adoption of constitutional coherentism does

---

liberal judges utilizing coherentism to reach outcomes in death penalty, affirmative action, and due process cases).

187. *See supra* notes 166-77 and accompanying text (relating problems of "insane" system and circularity and noting that legal coherentism is not fatally wounded by such problems).

188. *See id.* (expressing view that legal coherentism tries to make sense of legal system by involving all parts in decisionmaking process).

189. *Id.*

190. *See generally* Rorty, *Postmodernist Bourgeois Liberalism*, 80 J. PHIL. 583 (1983) (arguing that moral force of loyalties and convictions is wholly derived from conceptions of ourselves as members of particular group, society, or nation).

191. *Cf.* J. RAWLS, *supra* note 31, at 60, 136 (suggesting that all citizens would agree on principles of justice forming basis of legal system if all citizens were in same positions of wealth and status, which might suggest universal truth, but that such truth is illusory because it is merely result of mutual support of many considerations).

192. *See* Annis, *supra* note 6, at 347-49 (advocating relative foundationalism as more plausible than absolute); Triplett, *supra* note 130, at 100 (characterizing contextual foundationalists as contending that foundations vary with changing scientific, historical, or cultural conditions). For a general discussion of this area, see Krausz, *Relativism and Foundationalism: Some Distinctions and Strategies*, 67 MONIST 395, 396-97 (1984) (emphasizing differences between foundationalism and absolutism and noting that foundations of beliefs may change in foundationalism).

193. *See* D. BRINK, *supra* note 142, at 141 (claiming that if moral beliefs cohere with realist second-order beliefs about reality, then coherence provides evidence of objective moral truth); R. WALKER, *supra* note 33, at 4 (providing one form of coherentism where truth is

not inadvertently commit the legal system to controversial philosophies about relativism and the objectivity of truths and values.

CONCLUSION

This discussion has established some basic distinctions between the foundationalist and coherentist constitutional models and examined in particular the more exotic model, constitutional coherentism, insofar as the case law implicitly employs it. The examples of implicit constitutional coherentism only touch the surface of a fully articulated constitutional coherentism. For those judges intrigued by the unexplored possibilities of constitutional coherentism, further guidance, by way of analogy, is beginning to become available. Current developments in moral philosophy present some fairly elaborate models of coherentism.[194] As the insights of coherentist moral philosophers become systematized, coherentism's availability for use in constitutional jurisprudence increases.

Overall, proper recourse to the model of constitutional coherentism offers certain practical advantages without comparable costs. In appropriate cases, if a judge or a society believes independently, strongly, and dispassionately in the fairness of the relevant statutes, that commitment should contribute to the judge's reading of the open-ended or general constitutional provisions supposedly controlling those statutes.[195] Dismissing coherentism unjustifiably assumes, contrary to the well-established case law jurisprudence of judges across the ideological spectrum, that all constitutional reasoning must be foundationalist rather than coherentist. A dismissal of constitutional coherentism overlooks a source of legitimate democratic control over judicial arbitrariness and subjectivity, and does not protect more securely the rights of minorities.

---

coherence with God's belief system); Daniels, *Wide Reflective Equilibrium and Theory Acceptance in Ethics*, 76 J. PHIL. 256, 277 (1979) (stating that divergence among various systems of beliefs does not imply lack of objective truths). For a general discussion of the implications of the plurality of moral belief for moral objectivism, see Wright, *The Consequences of Contemporary Legal Relativism*, 22 U. TOL. L. REV. 73 (1990).

194. *See* J. RAWLS, *supra* note 31, at 46-51 (expounding wide reflective equilibrium theory that brings many different belief sets into single system to achieve broader equilibrium or coherence); *see also id.* at 21 (describing conception of justice not as involving self-evident principles, but as justification from mutual support of many considerations, fitting into coherent system). Among the leading exponents of Rawlsian coherentism is Professor Norman Daniels. *See* Daniels, *supra* note 193, at 257 (asserting that Rawlsian coherentism resolves some traditional worries regarding objectivity of ethics); Daniels, *supra* note 31, at 90 (arguing that Rawls' theory brings together theories of person, procedural justice, and morality); *see also* DePaul, *The Problem of the Criterion and Coherence Methods in Ethics*, 18 CAN. J. PHIL. 67 (1988) (supporting Rawls' thesis of many different belief sets integrated into single personal system).

195. *See* DePaul, *supra* note 194, at 85 (imparting message that coherentism should not be unduly influenced by differences in "levels" of beliefs or rules).